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GOOGLE LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JENNY HOUTCHENS, et al.,

Plaintiff,

v.

GOOGLE LLC,

Defendant.

Case No. 5:22-cv-02638-BLF

**DECLARATION OF RYAN KREMS IN
SUPPORT OF DEFENDANT GOOGLE LLC'S
MOTION TO COMPEL ARBITRATION, OR,
ALTERNATIVELY, MOTION TO DISMISS
PLAINTIFFS' CLASS ACTION COMPLAINT
AND REQUEST FOR JUDICIAL NOTICE**

Date: October 6, 2022
Time: 9:00 a.m.
Courtroom: 3
Judge: Hon. Beth Labson Freeman

I, Ryan Krems, hereby declare as follows:

1. I am a Group Product Manager at Defendant Google LLC (“Google”) and had a similar role at Fitbit, Inc. (“Fitbit”) prior to Google acquiring Fitbit. I oversee a team that is responsible for and manages all user software experiences for Fitbit smartwatches and trackers, including the account creation and device onboarding experience. I have personal knowledge of the facts set forth below and, if called to testify, could and would testify competently thereto.

2. Fitbit is a leading manufacturer of wearable smartwatches and activity trackers designed to help people set and achieve their health and fitness goals. Fitbit’s smartwatches and trackers are wireless-enabled devices, typically worn on the wrist, that measure user-related activity data, such as the number of steps walked or ran, minutes of activity, and other personal metrics.

3. I am aware that the Plaintiffs in the above-entitled action, Jenny Houtchens and Samantha Ramirez, have alleged that they each purchased a Fitbit smartwatch. Specifically, I am aware that the Plaintiffs allege that Ms. Houtchens purchased a Fitbit Versa Light in or around December 2020 and that Ms. Ramirez purchased a Fitbit Versa 2 in or around November 2021. I am also aware that Plaintiffs allege that the Fitbit devices they purchased caused burning on the wrist of Ms. Ramirez and the wrist of Ms. Houtchens’ daughter, which means that both Plaintiffs used their respective devices after purchase.

4. In order to begin using any new Fitbit device after purchasing that device, a user must first create a Fitbit account. A user must then pair his or her device to that account. A user is also free to create a Fitbit account before purchasing his or her device, but in no instance can he or she begin using his or her new device before creating an account. A child under the age of thirteen may not create his or her own Fitbit account. Instead, a guardian may elect to add a child account to his or her account.

5. Assuming the truth of Plaintiffs’ allegations, because both Fitbit devices that Plaintiffs purchased were used, a Fitbit account must have been created in connection with those devices.

6. A user can create a Fitbit account in one of three ways:

a. By registering online at Fitbit.com;

- b. By downloading the Fitbit Connect desktop application or a similar computer application and registering as a new user; or
- c. By downloading the Fitbit mobile application and proceeding through the sign-up process through that application.

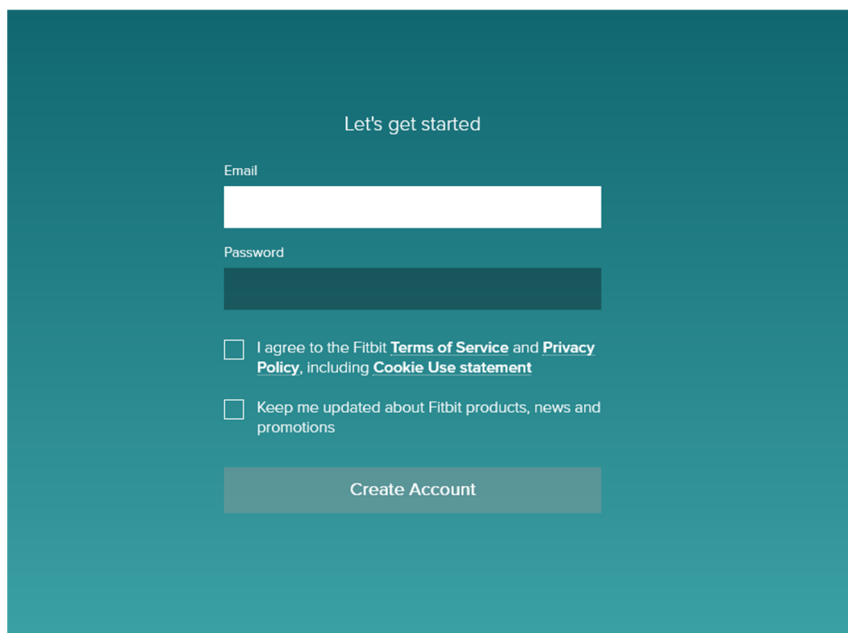
7. No matter which of the three methods described above the user uses to create an account, the user will be prompted to agree to Fitbit's Terms of Service before he or she is able to complete the sign-up process. In each case, the user will be presented with a blue hyperlink to the terms and must affirmatively check a box that indicates, "I agree to the Fitbit Terms of Service." After checking this box, the user must then additionally affirmatively click "Join Fitbit," "Create Account," or something similar, depending on the method of sign-up the user elected.

8. Between December 2020 and the present, the account sign-up flows remained materially the same and would have appeared either as shown in or substantially similar to the screenshots below for each account creation method:

Fitbit.com

The screenshot shows the 'Create New Account' page on Fitbit.com. At the top is the Fitbit logo. Below it is the heading 'Create New Account'. There is a blue button with the Google logo and the text 'Continue with Google'. Below this are two input fields: 'EMAIL' with the placeholder 'Your email address' and 'PASSWORD' with the placeholder 'Choose your password'. Below the password field are two checkboxes. The first checkbox is unchecked and has the text 'I agree to the Fitbit Terms of Service. Please also read the Privacy Policy including the Cookie Use statement.' The second checkbox is checked and has the text 'Keep me updated about Fitbit products, news and promotions.' Below the checkboxes is a grey button with the text 'Join Fitbit'. At the bottom of the form is a link that says 'Already a member? Log in'.

Fitbit Connect Desktop Application



Let's get started

Email

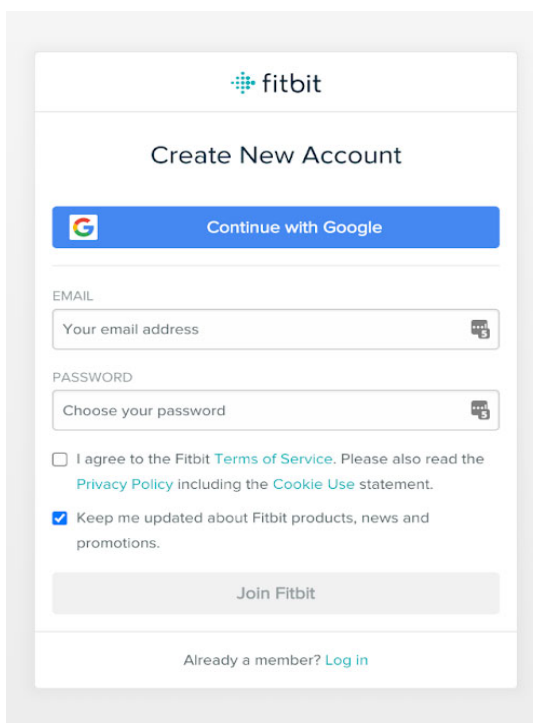
Password

☐ I agree to the Fitbit [Terms of Service](#) and [Privacy Policy](#), including [Cookie Use statement](#)

☐ Keep me updated about Fitbit products, news and promotions


Create Account

(Windows)



fitbit

Create New Account

 Continue with Google

EMAIL

Your email address

PASSWORD

Choose your password

☐ I agree to the Fitbit [Terms of Service](#). Please also read the [Privacy Policy](#) including the [Cookie Use statement](#).

☒ Keep me updated about Fitbit products, news and promotions.

Join Fitbit

Already a member? [Log in](#)

(MacOSX)

Fitbit Mobile Application

9:41

fitbit

Sign Up

Email address
Your account email

Password
Enter your secure password

☒ I agree to the Fitbit [Terms of Service](#)

☒ I consent to the use of my data as detailed in the [Privacy Policy](#)

☐ I want to receive communications about Fitbit products, news and promotions

NEXT

9. If the user created his or her account through Fitbit.com or by downloading the Fitbit Connect desktop application or similar computer application, and as shown above, he or she may have the choice to either enter his or her email and password on the initial sign-up screen or click “Continue with Google.”¹ If the user clicked “Continue with Google,” then the user would be directed to a second screen that would have appeared either as shown in the screenshot below, or substantially similar in all material respects to the screenshot below:

¹ This language—“Continue with Google”—may have changed slightly between December 2020 and the present but, in all cases, would have indicated that the user could create his or her account by proceeding using his or her Google account.

10. Prior to around April 2021, if the user created his or her account through Fitbit.com or by downloading the Fitbit Connect desktop application or similar computer application, he or she may additionally have had the option to “Sign up with Facebook.”² If the user clicked “Sign up with Facebook,” then the user would be directed to a second screen that would have appeared substantially similar in all material respects to the screen a user would see if the user had selected “Continue with Google,” a screenshot of which is included in paragraph 9 immediately above.

11. As shown in the screenshot in paragraph 9 above, and as is the case when a user does not click “Continue with Google” or “Sign up with Facebook” and, instead, enters his or her email and password on the initial sign-up screen (see paragraph 8 above), these options require the user to agree to Fitbit’s Terms of Service, which are hyperlinked in blue. The user must affirmatively check a box that indicates, “I agree to the Fitbit Terms of Service.” After checking this box, the user must then additionally affirmatively click “Join Fitbit,” or something similar.

² This language—“Sign up with Facebook”—may have changed slightly between December 2020 and April 2021 but, in all cases, would have indicated that the user could create his or her account by proceeding using his or her Facebook account.

12. If the user does not want to accept the terms by clicking “I agree to the Fitbit Terms of Service,” the user is free to reject them, abandon the sign-up process, and return his or her device.

13. A true and correct copy of Fitbit’s current Terms of Service, which were last updated on July 31, 2021, is attached hereto as **Exhibit A**. Fitbit’s Terms of Service are, and at all relevant times have been, available online at <https://www.fitbit.com/terms> and <https://www.fitbit.com/legal/terms-of-service>. All past versions of the terms are also available online at <https://www.Fitbit.com/global/us/legal/previous-terms>.

14. A true and correct copy of Fitbit’s Terms of Service, last updated on September 18, 2018, is attached hereto as **Exhibit B**. This is the version of the Terms that was in place prior to the current Terms, which as explained above, became effective as of July 31, 2021.

15. Both the current Terms and the version of the Terms that were updated on September 18, 2018—Exhibits A and B, respectively—contain a Dispute Resolution provision that requires users to resolve any disputes arising out of or relating to their use of the Fitbit Service or products through binding arbitration (the “Arbitration Agreement”). (*See* Ex. A ¶ 23; Ex. B ¶ 23.)

16. The Arbitration Agreement notifies users that they may opt out of the agreement to arbitrate by contacting optout@fitbit.com any time within 30 days of first accepting the terms and stating that they decline the Arbitration Agreement.

17. Fitbit maintains records of all opt-out requests it receives at optout@fitbit.com. These records go back at least as far as the beginning of December 2020.

18. As indicated in the Terms, to opt out of arbitration, a user must include her first and last name in the email she sends to optout@fitbit.com indicating that she declines the Arbitration Agreement. Google records the first and last name in its records. Google can then query these records by a user’s name.

19. Querying Google’s records using each Plaintiff’s last name—Houtchens and Ramirez—returned no results in either case, indicating that neither Ms. Houtchens nor Ms. Ramirez contacted Fitbit to opt out of the Arbitration Agreement.

20. Both Fitbit’s current Terms of Service and the previous version of the terms that were updated on September 18, 2018 also reference and link to Fitbit’s Limited Product

Warranty. (See Ex. A ¶ 13; Ex. B ¶ 13.)

21. A true and correct copy of Fitbit's Limited Product Warranty, last updated on July 8, 2020, is attached hereto as **Exhibit C**. Fitbit's Limited Product Warranty is, and at all relevant times has been, available online at <https://www.fitbit.com/global/us/legal/returns-and-warranty>. All past versions of the Limited Product Warranty are also available online at <https://www.fitbit.com/global/us/legal/previous-terms>.

I declare under penalty of perjury that this Declaration is true and correct.

Executed on June 30, 2022 in Mill Valley, California.

Ryan Krems

Ryan Krems

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